No. 2921

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

2

LOUIE DING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiff in Error

WALTER S. FULTON, and
WILLIAM R. BELL,
Attorneys for Plaintiffs in Error

1112 Hoge Building, Seattle, Wash.

Press of Pliny L. Allen Co., Seattle

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STATEMENT OF THE CASE.

The plaintiff in error was indicted together with Melvin B. Miller, William Kirkland, Louie E. Lortie, and Harry Toy for conspiring with his codefendants to violate Section 11 of the Act of Congress of May 6th, 1882, as amended and added to by the Act

of July 5, 1884, and the purpose of the conspiracy was alleged to be the bringing into the State of Washington from the province of British Columbia seven alien Chinese persons not lawfully entitled to be or remain in in United States. To the indictment, the defendants Miller, Kirkland and Lortie pleaded guilty, and the defendant Harry Toy and the plaintiff in error pleaded not guilty, and were placed on trial. (Trans. pages 1 to 7.)

At the conclusion of the trial the jury returned a verdict of guilty as charged in count one of the indictment as to the plaintiff in error, with recommendation of extreme leniency, and after a motion for new trial and motion in arrest of judgment had been duly interposed and denied, plaintiff in error was sentenced to serve a term of two years in the Federal Penitentiary at McNeil's Island and to pay a fine of five hundred dollars. From this judgment and sentence this appeal is prosecuted. (Trans. pages 7, 10, 79 to 82.)

At the inception of the case and before a jury was impanelled plaintiff in error demanded a severance of his trial from that of his codefendant, Harry Toy, which motion after argument was denied and an exception allowed. (Trans. pages 60 to 61.) Thereafter and before exercising his peremptory challenges, plaintiff in error through his counsel inquired of the court whether he would be permitted

to have the number of peremptory challenges allowed by law, to-wit, ten, or whether he would be required to divide the number of peremptory challenges with his codefendant. After consideration of the question it was ordered that the two defendants be required to exercise the peremptory challenges together and be allowed only ten such challenges in all. To this action of the court the plaintiff in error excepted and his exception was allowed. (Trans. pages 62 to 66.)

After having exhausted the ten peremptory challenges jointly as required by the order of the court, the plaintiff in error notified the court that he desired to exercise an additional challenge as to another juror then sitting, which application was denied and an exception allowed. (Trans. pages 65 and 66.) The jury was then sworn to try the case, and the attorney for the Government proceeded with his opening statement to the jury in the course of which, he made the following statement and admission:

> "The conspiracy in this case was formed first by the three white men going together, into which conspiracy came Ding and Toy. There is no connection between Ding and Toy. They were operating for their own purpose. Ding entered it for his own purpose, and Toy entered it for his. Ding and Toy came into the conspiracy then. The defendant Ding gave Lortie certain letters in Chinese for the purpose of having

Lortie deliver the same letter to another Chinese in the city of Vancouver. The defendant, Harry Toy, did likewise, not in the same presence, and not at the same time, but operating in the same common purpose. He gave a letter for the two Chinese, a letter to his confederate and friend in Vancouver. The white men had two letters. Lortie had the letter from Ding, and Kirkland had the letter from Toy, and with these letters in their pockets they sailed from Seattle, or rather, I should say, they went temporarily to Anacortes, and Lortie joined them at Anacortes; Miller and Kirkland took the boat to Anacortes, and Lortie got on the boat that night at Anacortes, and they all went to Vancouver on the gasoline boat, the 'Maud K.' Arriving in Vancouver they docked the boat, or anchored it near the shore on the outskirts at the gravel pit, near the golf links, on English Bay. I believe there is a car line goes out there from the city. They went into the city, Lortie going to the Chinese he was going to; and Kirkland went to the Chinese at 1902 Pender Street, and that Kirkland, in order to perfect the object of this conspiracy, went to the Chinese on Pender Street, and secured, or made arrangements for the delivery of two Chinese boys, or men, of the excluded class, that is, two Chinese laborers, to enter upon his boat and come down here. And Lortie took his letter up to another place in town and delivered it to one Louie, a Chinese whom he knew, and whom he had had some dealings with before, and pursuant to the delivery of that letter, which I believe contemplated the delivery of eight Chinese boys, only five were delivered. Five Chinese came down in one party, and two came down

in the other. Having placed them on board the boat, Lortie left the party and returned by other means of conveyance to the city of Seattle, coming, I believe, on one of the Canadian Pacific Railroad boats. Miller and Kirkland with the Chinese on board, navigated across from Vancouver to the city of Seattle. They landed here at the foot of Harrison Street in the city of Seattle and Lortie was here in the city waiting to receive them. Lortie received a telephone call from the defendant Kirkland, after he had disposed of the two Chinese to the defendant Toy; and that we will show as was done under the following circumstances * * * After Toy had received the two Chinese and walked off with them, Kirkland went away and went upon First Avenue, and then telephoned his friend Lortie, to send his man down for the five Chinese who still remained, and Lortie then came to the boat and received the five Chinese and piloted them through the city." (Trans. pages 25 to 27.)

As soon as the opening statement had been concluded, the plaintiff in error renewed his motion for a severance of the trial, on the ground that the statement showed two separate and distinct conspiracies, one entered into between the plaintiff in error and the defendant Lortie to bring in a definite number of alien Chinese in violation of law, and the other a conspiracy between the defendant Toy and his codefendant Kirkland to bring in two Chinese aliens in violation of law. This motion, after argument, was denied and an exception al-

lowed. (Trans. pages 27 and 28.) Thereupon the plaintiff in error moved that the action be dismissed and that he be discharged from custody. This motion was based upon the indictment and opening statement of counsel for the Government. The indictment by its terms charged one general conspiracy on the part of all the defendants to violate the immigration laws, while the opening statement of counsel for the Government disclosed that there were two separate and independent felonies, one a conspiracy between the defendant Lortie and the plaintiff in error to import seven alien Chinese into the United States, and the other a conspiracy between the defendant Toy and his codefendant Kirkland to import two alien Chinese into the United States. This motion, after argument, was denied and an exception allowed. (Trans. pages 29 and 30.)

The evidence of the Government tended to establish that about the eighth day of October 1915, the defendant Lortie entered into an arrangement with the plaintiff in error by the terms of which he was to bring from the Port of Vancouver in the Province of British Columbia to the Port of Seattle in the State of Washington, seven alien Chinese and that the plaintiff in error was to pay his codefendant a certain sum for each of the seven Chinese delivered to him at Seattle; that about the same time, but at a different place the defendant Toy entered

into an arrangement with the defendant Kirkland by the terms of which the latter was to bring from the Port of Vancouver in the Province of British Columbia to the Port of Seattle in the State of Washington two Chinese persons and was to receive an agreed compensation therefor; that Toy did not know about the arrangement between Lortie and the plaintiff in error, and the plaintiff in error did not know about the arrangement between Toy and his codefendant Kirkland, and the only connection, if any, between the two plans or alleged conspiracies, a connection which was not known by or disclosed to either of the principals, was that the two employes, Lortie and Kirkland, used the same means of transportation in shipping alien Chinese from the City of Vancouver to the City of Seattle. (Trans. pages 30 to 33.)

In the course of the Government's case in chief an attempt was made to prove that the seven Chinese referred to in the indictment belonged to a prohibited class, that is, were Chinese laborers, but the only proof adduced was that they were Chinese. (Trans. page 56.)

At the conclusion of the Government's case in chief, the plaintiff in error moved the court to direct the jury to return a verdict of not guilty. This motion was based upon two grounds, First that the evidence disclosed two separate conspiracies between

which there was no connection established and, Second that the proof failed to show that the Chinese brought from the Port of Vancouver in the Province of British Columbia to the Port of Seattle in the State of Washington belonged to a prohibited class, and not lawfully entitled to enter the United States. The motion was denied and an exception allowed. (Trans. page 36).

In the course of the defendant's case a witness named William Kirkland who was able to give material evidence in support of the defense tendered by the plaintiff in error was called to the stand, but was rejected as a witness by the trial court, because in the opinion of the court, the witness did not believe in a future state wherein he would be punished for any sins committed in this world. To this ruling of the court the plaintiff in error excepted. (Trans. pages 75 and 76.)

Prior to the rejection of this witness, he was interrogated by counsel for the respective parties and by the court as to his religious beliefs and in answer said that he believed in a Supreme Being who was the Creator of all things, but that punishment for false swearing would come in this life and not in the hereafter. (Trans. pages 66 to 74.)

ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the motion of the plaintiff in error for a separate trial, which motion was made immediately after the opening statement by the attorney for the Government and before the introduction of any evidence, this statement disclosing that the facts relied upon by the Government for a conviction would establish two separate and distinct conspiracies, one entered into by the defendants Toy and Kirkland and the other entered into by the defendants Ding and Lortie. Timely exception was taken to the action of the court in overruling the defendant Ding's motion for a severance. (Trans. pages 27-28) Thereupon the plaintiff in ereror moved the court to dismiss the action and discharge him from custody. This motion also was denied and an exception allowed. (Trans. page 30.)

II.

The court erred in overruling the motion of the plaintiff in error for a directed verdict of acquittal made at the close of the evidence introduced by the Government in support of the indictment, which motion was based upon the following several grounds:

a. Improper joinder of two separate and distinct felonies;

b. Insufficiency of the evidence to establish any conspiracy between the defendant Ding and the other defendants.

c. Insufficiency of the evidence to establish that the Chinese alleged to have been transported from the City of Vancouver, B. C. to the City of Seattle, belonged to a prohibited class of aliens;

d. That the alleged conspiracy to import alien Chinese had been consummated and merged into the substantive offense of importing aliens. (Trans. page 36.)

III.

The court erred in overruling the motion of the plaintiff in error for a directed verdict of acquittal made at the close of the entire case and before it was submitted to the jury which motion was based upon the following grounds:

a. Improper joinder of two separate and distinct felonies;

b. Insufficiency of the evidence to establish any conspiracy between the defendant Ding and the other defendants;

c. Insufficiency of the evidence to establish that the Chinese alleged to have been transported from the city of Vancouver, B. C. to the city of Seattle,

belonged to a prohibited class of aliens;

d. That the alleged conspiracy to import alien Chinese had been consummated and merged into the offense of importing aliens. (Trans. page 36.)

IV.

The court erred in requiring the two defendants on trial, Harry Toy and the plaintiff in error to divide between them the number of statutory peremptory challenges, for the reason that there was no connection between the said defendants, and the offenses alleged to have been committed by them were separate and distinct felonies. (Trans. pages 62 to 66.)

V.

The court erred in permitting a number of jurors, over the objection of the plaintiff in error, who had sat as trial jurors in the case immediately preceeding the one on trial, in which the United States of America was plaintiff, and the plaintiff in error was one of the defendants, and in which the issues and the evidence were identical with this case, to be impanneled and sworn in this cause. (Trans. pages 75 and 76.)

VI.

The court erred in refusing to permit William Kirkland to testify when called as a material wit-

ness on behalf of the plaintiff in error.

When this witness was called to the stand, the following questions were asked and the following answers given:

THE COURT: "Let me ask this question again. Do you believe, or do you disbelieve, in the existence of a God who is the rewarder of truth and the avenger of falsehood, either in this life or in the hereafter. Now, you can answer that directly?

A. Why, I cannot come to believe that a man is rewarded or punished in the hereafter. I believe that there is a Creator and a cause for all of us.

Q. I have told you to answer my question, and you evade it. I asked directly and very pointedly, whether you did believe in the existence of a God who is the rewarder of truth and the avenger of falsehood either in this life or hereafter?

A. Well, I believe a man is rewarded in this life, as I said before.

Q. And you believe he is avenged in this life for falsity?

A. Yes, if he speaks false, it is only a matter of time until he is in trouble. I believe a man can tell the truth just as well without an oath as with it. I know that I can.

* * * * * * * * *

Q. (By MR. MARTIN, U. S. District Attorney) You believe that punishment is due to the existence of a Supreme Being acting through your conscience?

A. There is Something, I don't know what It is.

Q. And that Supreme Power, acting through your conscience, leads you to believe that it is better to tell the truth because of the results which may follow?

A. It may follow, yes, I don't know—I don't know what the hereafter is.

THE COURT: We are not asking you about that. I am asking the condition of your mind at the present time as to your belief in a future state?

A. Just as I have told you, as I have already told you, I believe there is a Creator, or a Cause for us existing here, which any reasonable man would know, but what It is, I don't know. I doubt all their religious ways they have of knowing who the Man is.

THE COURT: I don't care anything about that.

A. Or who the Being is, or what it is.

THE COURT: I simply wanted to know if your conscience is affected by the realization and appreciation that there is a Supreme Being that overrules and directs your conscience, and that is

what I want to know. And that your either favorable or unfavorable conduct in this life will be rewarded or avenged hereafter.

A. I don't think that you are rewarded or avenged in the hereafter.

THE COURT: Do you think you are in this life?

A. I believe that a man is. His good acts in this life will show among his fellow men, and he will get along a great deal better, and he is rewarded in other ways. I think if a man is good he will be rewarded with good, and if he is bad he is punished by this rule on this earth."

(Trans. pages 69 to 74.)

VII.

The court erred in denying the motion of the plaintiff in error for a new trial, which motion was made in due time, after the jury had returned a verdict of guilty as charged in the first count of the indictment, upon the following grounds:

(1) That said verdict was against and contrary to law; (2) That said verdict was against and contrary to the evidence; (3) Insufficiency of the evidence to justify the verdict; (4) Error of law occurring during the trial and excepted to at the time by the plaintiff in error; (5) Erroneous instructions given to the jury by the trial judge; (6) Variance

between the indictment and the proof introduced at the time of the trial; (7) Misjoinder of parties defendant; (8) Misjoinder of separate and independent offenses. (Trans. pages 8-10.)

VIII.

The court erred in denying the motion of the plaintiff in error in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged in the first count of the indictment, upon the following grounds:

(1) That said verdict was against and contrary to law; (2) That said verdict was against and contrary to the evidence; (3) Insufficiency of the evidence to justify the verdict; (4) Error of law occurring during the trial and excepted to at the time by the said defendant; (5) Erroneous instructions given to the jury by the trial judge; (6) Variance between the indictment and the proof introduced at the time of the trial; (7) Misjoinder of parties defendant; (8) Misjoinder of separate and independent offenses. (Trans. pages 9-10.)

IX.

The court erred in imposing a sentence upon the plaintiff in error to serve a term of two years in the United States penitentiary at McNeil's Island in the State of Washington and pay a fine of five hundred dollars. (Trans. pages 82 to 86.)

ARGUMENT

First.

In this subdivision we will discuss the action of the trial court in denying the application of the plaintiff in error for a separate trial. This motion was made immediately after the opening statement for the Government and before the introduction of any evidence. (Trans. pages 27, 28) This opening statement of counsel for the Government disclosed that while the indictment charged one general conspiracy there were, in fact, two separate, distinct and independent conspiracies, the facts in one conspiracy being different from the facts in the other, and the purpose of each conspiracy being separate and distinct. (Ante pages 3 to 5; Trans. pages 25-27)

It is a general rule that two distinct offenses not provable by the same evidence and in no sense resulting from the same series of acts cannot be joined in the same indictment or tried at the same time. Assuming this premise, the defendants on trial were entitled to a severance since the opening statement of the Government disclosed that there would be proof submitted of two separate and distinct conspiracies, and it was error for the trial court to deny the motion.

In the case of *United States vs. Dietrich,* 126 Fed. 675, it was said at page 677:

> "Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end. *Oscanyan vs. Arms Co.,* 103 U. S. 261, 26 L. Ed. 539; *Liverpool, etc. Co. vs. Commissioners,* 113 U. S. 33, 37, 5 Sup. Ct. 352, 28 L. Ed. 899; *Butler vs. National Home,* 144 U. S. 64, 71, 73, 12 Sup. Ct. 581, 36 L. Ed. 346; *Pratt vs. Conway,* 148 Mo. 291, 299, 49 S. W. 1030, 71 Am. St. Rep. 602; *Lindley vs. Atchison, etc. Co.,* 47 Kan. 432, 28 Pac. 201."

After the denial of the motion for a severance a motion to dismiss the case was interposed by the plaintiff in error for the same reasons advanced in support of the motion for a severance. This motion also was denied and an exception allowed. (Trans. page 30) That the denial of this last motion was erroneous will appear more clearly after a discussion of the refusal of the court to grant a directed

verdict, which discussion will come under the second subdivision herein.

Second

In this subdivision we will discuss the refusal of the court to direct a verdict of acquittal in favor of the plaintiff in error, first interposed at the close of the Government's case in chief and again interposed at the close of the entire case. (Trans. pages 34 to 36) The principal grounds urged in support of the motion for a directed verdict were, First, improper joinder of two separate and distinct felonies, and Second, insufficiency of the evidence to establish that the Chinese alleged to have been transported from the city of Vancouver in the Province of British Columbia to the city of Seattle in the State of Washington belonged to a prohibited class of aliens.

In the opening statement, as hereinbefore pointed out, counsel for the Government admitted there was no connection between the defendants Ding and Toy, that each was operating for his own purpose, and did not know of or participate in the purpose of the other. (Trans. page 25; ante pages 3 to 5). The witnesses for the Government testified that the plaintiff in error and the defendant Lortie had entered into a scheme or arrangement by the terms of which Lortie

was to bring from Vancouver, B. C. to Seattle, Washington seven Chinese and to receive so much per head, and that pursuant to this arrangement, he went to Vancouver by way of Anacortes, secured five Chinese by means of a letter furnished by the plaintiff in error, shipped them to Seattle in a small launch belonging to the defendant Miller, returning himself by another route. About the same time and without the knowledge either of defendant Lortie or the plaintiff in error, the defendant Kirkland entered into a scheme or arrangement with the defendant Toy by the terms of which he was to bring from the city of Vancouver in the Province of British Columbia to the City of Seattle, certain alien Chinese and receive an agreed compensation therefor, that thereupon he proceeded directly from the Port of Seattle to the Port of Vancouver on a small launch operated by the defendant Kirkland, secured the two Chinese agreed upon and brought them from the Port of Vancouver to the Port of Seattle and delivered them to his patron and co-defendant Harry Toy. The only connection between the two alleged conspiracies, if connection it could be called, was the fact that both Kirkland and Lortie shipped their complement of Chinese from Vancouver to Seattle on the same boat, the launch "Maud K", belonging to and operated by the defendant Miller. (Trans. pages 30 to 33.)

A short quotation from the testimony will add force to the foregoing narrative of the facts:

Q. (By MR. BELL, Attorney for plaintiff in error.) "Now, did you ever talk to Mr. Kirkland about Louie Ding in connection with this smuggling proposition?

A. No sir.

Q. Did Louie Ding know about Kirkland from you?

A. Yes sir, I believe he did. I think we talked about Kirkland.

Q. You think you talked about Kirkland?

A. It seems to me we did.

Q. What was the reason you talked to Louie Ding about Kirkland in connection with this smuggling expedition? Explain that to the jury.

A. Louie Ding explained to me that Kirkland had brought two Chinamen in. He didn't call him by name. He may have, too, but I know he mentioned the one armed Chinaman—(Harry Toy).

Q. What was the reason you talked with Louie Ding about Kirkland in connection with this smuggling expedition? Explain that to the jury.

A. Louie Ding told me that Kirkland would cause me trouble.

Q. Did you and Louie Ding have anything to

do with Kirkland's deal with this other one armed Chinaman that you spoke of?

A. No sir.

Q. That was entirely independent then, of your deal with Louie Ding?

A. Yes, he knew nothing about that as far as I was concerned.

Q. Did you tell Louie Ding about these other Chinamen being brought over by Kirkland for Harry Toy?

A. I told Louie Ding that Kirkland had brought two Chinamen.

Q. That was after you returned, and you told him that Kirkland brought a batch of Chinamen for some one else.

A. Yes sir.

Q. You didn't tell him that before you went to Vancouver?

A. No sir.

Q. He knew nothing whatever about that?

A. No sir." (Testimony of Louie E. Lortie, Trans. pages 30 to 32.)

Q. (By MR. BELL, attorney for plaintiff in error) "Mr. Miller, who was it that first spoke to you, or suggested to you first that you join in on this smuggling expedition? Was it Mr. Lortie?

A. No sir, Mr. Kirkland.

Q. Then it was with Kirkland that you went in on this deal?

A. Yes sir.

Q. And not with Lortie?

A. No sir.

Q. And you hadn't had any talk with Louie Ding about going into this particular expedition, had you?

A. No, I was going after two sets of Chinamen.

Q. You learned that from Lortie?

A. Yes.

Q. And you learned that on the boat?

A. Yes.

Q. And your arrangements were made with Kirkland?

A. Yes, on Mr. Toy's case.

Q. And not with Lortie on the Ding case. That was Lortie's venture, wasn't it?

A. Yes.

Q. And you had nothing to do, and Kirkland had nothing to do with that, had you?

A. Well, we was all together.

Q. You were all together in the same boat, I understand that, but you and Kirkland were in the deal to smuggle Chinamen for Harry Toy, weren't you?

A. Yes sir.

Q. And Lortie was in the deal to smuggle Chinamen for Louie Ding?

A. Yes sir." (Testimony of Melvin B. Miller, Trans. pages 32 and 33.)

The authorities hold quite generally that where it appears from the indictment that two separate and distinct felonies are charged a demurrer will lie, and if the indictment by its terms charges a joint offense, such as a general conspiracy, but the evidence discloses two distinct and independent offenses, the court, on motion, should direct a verdict of acquittal as to each defendant jointly charged. The leading case upon this subject is *McElroy vs. U. S.* 164 U. S. 76. In that case two indictments, one against several defendants for assault with intent to kill and another against some of them for arson committed on the same day were consolidated and the court held that it was improper to try the defendants jointly on these indictments, even though the record did not show that the defendants were in any way prejudiced or embarrassed in their defense. In the opinion it is said at page 79:

> "On the face of the indictments there is no connection between the acts charged as committed April 16 and the arson alleged to have been committed two weeks later, on which last occasion the Government's testimony, according to the record, showed that the two defendants Charles Hook and Thomas Stufflebeam were

not present. The record also discloses that there was no evidence offered tending to show that there had been or was a conspiracy between defendants, or them and other parties, to commit the alleged crimes.

"The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction. *Young vs. The King,* 3 T. R. 98, 106; *Reg. vs. Heywood,* Leight & Cave C. C. 451; Tindal, C. J.; *O'Connell vs. Reg.,* 11 Cl. & Fin. 241; *Reg. vs. Ward,* 10 Cox C. C. 42; *Rex vs. Young,* Russ & Ry.. 280; *Reg. vs. Lonsdale,* 4 Fost. & Fin. 56; *Goodhue vs. People,* 94 Illinois, 37; *State vs. Nelson,* 8 N. H. 163; *People vs. Aiken,* 66 Michigan, 460; *Williams vs. State,* 77 Alabama, 53; *State vs. Hutchings,* 24 S. C. 142; *State vs. McNeill,* 93 N. C. 552; *State vs. Daubert,* 42 Missouri, 242; 1 Bish. Cr.

Proc. Sec. 259. Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is devisable on error.

"It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts.

"Under the third clause relating to several charges 'for two or more acts or transactions of the same class of crimes or offenses,' it is only when they 'may be properly joined' that the joinder is permitted, the statute thus leaving it for the court to determine whether in any given case a joinder of two or more offenses in one indictment against the same person 'is consistent with the settled principles of criminal law,' as stated in *Pointer's case.*

"It is admitted by the Government that the judgments against Stufflebeam and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment,

> may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

In *Elliott vs. State,* 26 Alabama, 78, it was held that where an indictment upon its face charges several defendants with several offences, committed by them independently of each other some of which were committed by some of the defendants at one time and some by others of the defendants at a different time is fatally defective, and that though an indictment be unobjectionable on its face, no conviction can be had upon proof of facts which if stated in the indictment would make it fatally defective and enable the defendants after conviction to arrest or reverse the judgment. In the opinion it is said:

> "The general rule as to the joinder of defendants, as laid down in works of good authority, is, that where the same evidence, as to the act which constitutes the crime, applies to two or more, they may be jointly indicted. If the offense arise out of the same act, though the parties stand in different relations, they may be

joined. If several be engaged in the commission of the same offences, though each may act a different part in the commission of that offense, they may be joined * * *

"We are, therefore, clear in the opinion that an indictment would be fatally defective, if upon its face it charged several defendants for several offenses committed by them independently of each other, some of which were committed by some of the defendants at one time, and some of which were committed by others of the defendants at a different time.

"Where these facts do not appear upon the face of the indictment, but do appear upon the trial from the evidence, the defendants are as much entitled to the benefit and protection of the rules of law above laid down, as if the indictment had fairly stated the facts, and thus given them an opportunity to demur to it, or to move in arrest of judgment. The mere form in which an indictment may be drawn by the prosecuting attorney, ought never to be allowed to evade or destroy any substantial legal right of the defendant. However unobjectionable on its face, an indictment may be, a conviction under it cannot lawfully result from proof of the identical facts which would, if distinctly stated in it, vitiate the indictment, and enable the defendants, even after conviction, to arrest or reverse any judgment rendered on it against them."

In the case of *McGehee vs. State,* 58 Alabama 360, it was held that if an indictment charges that two defendants committed one and the same offense at the same time, they cannot be convicted on

proof showing that each committed the offence charged at different times, and when this is developed by evidence on the trial, each defendant has been placed in legal jeopardy on the charge laid in the indictment and is entitled to a verdict of acquittal of that offence. In the opinion it is said:

> "If it had been averred in this indictment that the two defendants had committed separate and distinct offences, at different times,—neither being present or participating in the offence of the other—a demurrer to the indictment would have lain, notwithstanding the two offences charged are identical in character. This on the well defined ground, that on such trial, it would be necessary to offer proof of two independent transactions; thus producing inextricable confusion of the minds of the jurors.
>
> "On like principles, if two offenders be charged in one indictment, which is faultless in form, and it be developed in the evidence that the two defendants commmitted their several offenses at different times or places—in other words, that they are not guilty of one and the same offense—the proof does not sustain the indictment. Only those persons who participate in the same offense should be joined in one indictment.
>
> "In the present case, according to the recitals in the bill of exceptions, each defendant was equally guilty, but they did not participate in one and the same offence. This was not shown until the evidence was given to the jury. At that state of the trial, each defendant was placed in legal jeopardy, and was entitled to

have a verdict of the jury on the question of his guilt in the absence of some statutory or legal ground, authorizing a *nolle prosequi* or other withdrawal from the jury, that another indictment might be preferred, or continuance granted.

"There being no statute authorizing the entry of a *nolle prosequi* to cure the defect which was developed on this trial, the Circuit Court erred in its allowance. This ruling is decisive of the present prosecution. The defendants having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, must be allowed the benefit of the verdict they were entitled to, and cannot be again tried for the same offence."

In the case of *Lindsey vs. State,* 48 Alabama 169, the defendants were jointly indicted for gambling and jointly tried. In the evidence it appeared that two of the defendants played together at a public place, and that the other defendant played with persons not indicted at the same time and place, the two games being separate and distinct, and it was held that the three defendants could not be jointly charged and jointly tried. In the opinion of the court, it was said:

"The charge made in the indictment is a single offence. The defendants are alleged all to have played 'at a game of cards.' They all participated in the same act which was forbidden by law. This is the purport of the indictment; and it follows the language of the statute.

> A public offence is an act forbidden by law, and punishable as prescribed by the code or by the statutes. An indictment is an accusation in writing, presented by the grand jury of the county, charging the person with an indictable offence. All the persons charged must participate in the same act denounced as an offence, to render them guilty; and the guilt must be proved as charged. Here there was but one act charged,—but one playing. Yet the proof showed two acts,—two playings. These were each the subject of an indictment. And the evidence which would establish the one act could not establish the other. It would necessarily be variant. And although not objected to on this account, as it might have been, its legal force could not be extended by the charge of the court, beyond its legitimate effect. This, however, is the effect of the second charge above quoted. This charge was improper. There should have been two indictments, as there were two distinct offences, in which the same persons did not participate."

In the case of *State vs. Hall,* (N. C.) 1 S. E. 683, the Mayor and aldermen of the city were jointly indicted for failure to perform certain duties imposed by the terms of the city charter, and it was held that in as much as the duties of the Mayor were distinct from those of the aldermen, a joint indictment would not lie. In the opinion, it was said:

> "But, moreover, the indictment insufficiently charges two distinct offences against two distinct boards of officers sustaining distinct relations to the city of Wilmington. This is

wholly unwarranted by principle or precedent. Different parties cannot be charged with different and distinct offences in the same indictment. Such a practice would be impracticable, and lead directly to injustice and confusion."

In the case of *Townsend vs. State,* (Ala.) 34 So. 382, the defendants were jointly charged with and convicted of gambling in a public place. All of the defendants were engaged in playing at the same time and place, but because two games were played in one of which some of the defendants played, and in the other the remaining defendants, it was held that they could not be jointly tried and pointly convicted. From the opinion of the court, we quote the following:

"The affidavit upon which this defendant was tried and convicted charged that he and nine other persons therein named played at a game with cards or dice, or some device or substitute for cards or dice, in a highway or some other public place. The evidence undisputedly showed that two of the persons named did not play in the same game with this defendant, but played in another game at the same place, and at the same time. This fact clearly brings the case within the principle that was allowed to control in *Elliott vs. The State,* 26 Ala. 78, and *McGehee vs. The State,* 58 Ala. 360. This defendant and those playing in the game with him should have been proceeded against separate and apart from the others who played in a different game, or the prosecution should have been against each separately."

In a leading English case, *O'Connell vs. Rex*, 11 Clark & Finnelly 241, the defendants were jointly indicted for conspiracy. In the evidence it appeared that instead of one conspiracy, there were in fact, as in the present case, two separate conspiracies, similar in many respects, but each independent of the other, and the court held that it was improper, confusing and prejudicial to try all of the conspirators jointly. From the opinion we briefly quote as follows, at page 236:

> "Upon the second question (of the House of Lords), we all agree in opinion that the findings of the jury upon the first, second, third, and fourth counts of the indictment, are not supportable in law. With respect to the first and second counts,—upon the ground that the jury not only find the eight defendants to be guilty of a joint conspiracy charged in each of these counts, but also find a certain number of those eight defendants to have been guilty of separate and distinct conspiracies under the same counts. With respect to the third count,—because they find three of the defendants guilty of a conspiracy to effect all the objects stated; the rest of the defendants, except Thomas Tierney, guilty of a conspiracy to effect part only; and Thomas Tierney a still smaller part of the objects mentioned in the third count. And a similar objection, in point of principle, applies to the findings upon the fourth count, on which all are found guilty of the whole of the charge, except Mr. Tierney, who is found guilty of part only. And the reason and ground for such opinion is this: That as each count of the indict-

ment charges one conspiracy or unlawful agreement, and no more than one, against all the defendants in such count, so the jury could find only one conspiracy or unlawful agreement on each separate count; for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is, in truth, finding several conspiracies, on a count which charges only one."

To the same effect, see:

Thomas vs. State (Ala.) 20 So. 617;
Cox vs. State, 76 Alabama 69;
People vs. Aiken (Mich) 33 N. W. 825;
U. S. vs. Dietrich, 126 Fed. 664.

It was wrong in the first instance to join the defendants Ding and Lortie in the same indictment with the defendants Toy and Kirkland, but, in as much as the indictment charged all of the defendants with participation in the same criminal conspiracy, it was impossible to raise the objection by demurrer. When, however, it was admitted by counsel for the Government in his opening statement that there was no connection between the two groups of defendants, or between the schemes in which they were engaged, the motion to dismiss should have

been granted. The opening statement of counsel for the Government having been supplemented by the evidence of the witnesses, which evidence established beyond all question that both the parties and the offences were separate and distinct a motion for a directed verdict of acquittal interposed first at the close of the Government's case in chief and again at the close of the entire case should have been granted.

No Evidence that Chinese Brought in Were of a Prohibited Class of Aliens.

For another reason, the motion for a directed verdict should have been granted. In the indictment, it was charged that the purpose of the conspiracy formed by the defendants was to bring into the United States, a certain number of persons belonging to a prohibited class, i. e., alien Chinese laborers. This was an essential allegation in the indictment, and it was equally essential that proof should be introduced in support of it. An attempt was made on the part of the Government to support this allegation by evidence, but the attempt signally failed. The first witness for the Government interrogated upon this point was Louie E. Lortie, who testified as follows:

Q. (My MR. MARTIN, Asst. Dist. Atty.) "Do

you know who these Chinese people were, or what their business was?

A. No, not their particular business. I know they were coming over here to America.

Q. Were they the laboring class of Chinese, do you know?

A. Well, I could not say.

Q. You knew they were coming to the United States?

A. Yes. Some of them seemed to be pretty intelligent, and others were not." (Trans. pages 43-44)

The next witness and the only other witness who testified upon this point on behalf of the Government was the defendant Melvin B. Miller, who testified as follows:

Q. "What kind of persons were these who were put on board?

A. Chinamen.

Q. What kind of Chinamen?

A. What kind of Chinamen?

Q. Yes.

A. Just ordinary Chinamen, as near as I know. Chinese.

Q. Do you know whether they were Chinese laborers or not?

MR. BELL (Attorney for plaintiff in error):

We object to that as suggestive and leading.

A. I suppose they were.

THE COURT: It is leading. Just state what was said.

A. I supposed they were laboring Chinamen. They looked like.

MR. BELL: I move that be stricken. He says he supposed.

THE COURT: Let the answer be stricken as to what he supposes." (Trans. page 16).

This is all of the testimony introduced by the Government to establish the kind or character of the aliens alleged to have been unlawfully imported, and it was clearly insufficient to support the allegations of the indictment. For this reason alone the trial court should have granted the motion of the plaintiff in error for a directed verdict and its refusal to do so was erroneous.

Third

In this subdivision, we will discuss assignments of error four and five.

Prior to entering upon the examination of the jurors, the plaintiff in error insisted that he was entitled to exercise ten peremptory challenges and should not be required to divide the number of the peremptory challenges allowed by statute with his

codefendant, Harry Toy. The court however, ruled otherwise and compelled the two defendants to exercise jointly the ten peremptory challenges allowed by law, which in effect gave to each of the defendants five peremptory challenges. To this ruling the plaintiff in error excepted and his exception was allowed. (Trans. 60 to 66.)

The rule is well established in the Federal courts that where a number of indictments against the same defendant charging similar offenses are tried together by the same jury, the defendant is entitled to the statutory number of peremptory challenges to each indictment. In the case of *Betts vs. United States,* 132 Fed. 228, there were nine indictments returned against the defendant, each indictment containing three counts. These indictments were consolidated for trial and in the course of the trial the question arose as to whether the defendant was entitled to three peremptory challenges in all or three peremptory challenges to each of the indictments, and the court held that he was entitled to twenty-seven peremptory challenges for the reason that if the defendant had been tried separately on each indictment he would have been entitled to that number. In the course of the opinion, the court uses the following language, at page 234:

> "The only other error assigned which requires consideration is with reference to the

number of challenges to which Betts was entitled. It is first necessary to consider further the nature of the proceeding involved in the order of the court that the indictments should be 'tried together and at the same time.' We have said that under the circumstances this was not a consolidation in the proper sense of the word. The natural meaning and inherent force of the word 'consolidation' are perfectly plain and irresistible, although it is known that in some of the authorities the word is used loosely. It has its place in proceedings in equity, or in admiralty, where several libels or petitions are, by authority of the court, combined into one, so that at the close only one decree is rendered. An example of this in admiralty is found in *The North Star,* 106 U. S. 17, 27, 1 Sup. Ct. 41, 27 L. Ed. 91, where unification by consolidation proper was clearly expressed. Beyond all question, no such consolidation could arise with reference to the present indictments, because otherwise the implied prohibition of the statute on which they were based against combining in one indictment more than three offenses would be indirectly defeated. The result is that, as neither indictment lost its identity, the material rights of both parties as to each continued the same, unless so far as otherwise necessarily involved in the trial of all at the same time with the same jury, or unless so far as expressly provided by statute or necessarily implied from what the statute enacts. Accordingly, in *Mutual Life Co. vs. Hillmon,* 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706, in speaking of the statutes we are discussing, it naturally fell into the use of the following language: 'No defendant could

be deprived (meaning none could be deprived by an order for trying cases together), without its consent, of any right material to its defense, whether by way of challenge of jurors,' etc. It is true that this broad language was not strictly essential to the case in which it was used, but the way in which the court fell into it illustrates strikingly that it is the natural construction to be given to the statutes in question. Therefore it rests on the United States to make it clear that this natural reading should not have full effect. With such reading the conclusion follows that, inasmuch as by the express language of section 819 of the Revised Statutes (U. S. Comp. St. 1901, p. 629) the plaintiff in error had a right to three peremptory challenges on each indictment if tried separately, this was a 'right material' to his defense, not to be taken away merely because several indictments were submitted to the same jury at the same time. Not only is there no provision of the statute to the contrary, but there is nothing in the practical conditions of a joint trial which would justify the court in holding that the statute by implication necessarily deprived the plaintiff in error of the right claimed by him."

In the case of *Mutual Life Insurance Co. vs. Hillmon,* 145 U. S. 285, 293, a similar rule is announced as follows:

"But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived without its consent, of any right material

to its defence, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately. Section 819 of the Revised Statutes provides that in all civil cases 'each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section.' Under this provision, defendants sued together upon one cause of action would be entitled to only three peremptory challenges in all. But defendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together. The denial of the right of challenge, secured to the defendants by the statute, entitles them to a new trial."

See also, *Krause vs. U. S.* 147 Fed. 44, 46.

It was especially important to the plaintiff in error to be allowed to exercise the full number of peremptory challenges allowed by statute. Immediately prior to the calling of the present case for trial, the plaintiff in error together with certain other defendants had been tried and found guilty of conspiring to bring into the United States alien Chinese of a prohibited class. The jury which heard the evidence in that case and which returned a verdict of guilty was drawn from the same panel as the jurors in the present case, and, indeed, most of the

jurors called from the panel in the present case had served as jurors in the prior one. After the plaintiff in error had exercised the five peremptory challengse allowed to him by virtue of the order of the court, he was desirous of exercising other and additional challenges for the reason that there remained upon the jury a number of jurors who had served in the preceeding case, and who upon similar testimony had found the defendant guilty as charged, and this fact was brought to the attention of the court at the time that the plaintiff in error, through his counsel, insisted upon his right to exercise the ten peremptory challenges allowed by statute independently of his codefendant. These jurors who had sat in the preceeding case were disqualified for that reason alone from sitting as jurors.

In the case of *Sessions vs. State,* (Tex.) 38 S. W. 605, it was held that jurors are disqualified to try a person having tried a case involving the same transactions against a codefendant, though they state that they have not formed an opinion as to his guilt or innocence, and could try the case impartially. In the opinion, it was said,

> "Appellant, on the impanelment of the jury in this case, challenged five of the panel furnished him, on the ground that they had tried a case against Virgil Adkins, charged with theft of the same horse, and had found him guilty. The court overruled his challenge, and com-

> pelled him to pass on the jurors. He challenged two of them peremptorily, but three sat upon the jury. The bill of exceptions shows that these jurors stated that, notwithstanding they had tried a case involving the same transaction against a codefendant of appellant, they had not formed an opinion as to the guilt or innocence of the defendant, and could try him impartially. It is also shown that appellant exhausted his challenges. It has been held by this court that jurors, under such circumstances, are disqualified."

In the case of *Obenchain vs. State,* (Tex.) 34 S. W. 278, it was held that jurors who tried a person for playing at a game of cards in a public place and rendered a verdict of guilty were incompetent to sit upon a subsequent trial of another person for playing with the former at the same game, where the evidence on the second trial was substantially the same as that on the first. In the opinion in that case it was said:

> "It will be observed, from the foregoing, where the juror states he has formed an opinion, and that it will influence his verdict, he is to be discharged. If, however, he answer that he has formed an opinion, but that such opinion will not influence his verdict, he shall be further examined, as to how his conclusion was formed, etc. Said statute further expresses the idea that, if the opinion in question was formed from mere hearsay, and the juror then states, on oath, that he can, with such an opinion, render an impartial verdict upon the law and the evidence,

the court may, in its discretion, admit him as competent to serve in such case. This would appear to negative the proposition that, if the juror had reached his conclusion from having received his information from the witnesses in the case, or from having heard the evidence developed on the trial of the case, it was the intention of the legislature to exclude him as an incompetent juror; and, with a stronger reason, it occurs to us, that, if he has formed his conclusion in the case in the most solemn manner authorized by law,—that is, having, as a juror, under his oath, heard the testimony and rendered a verdict upon the same evidence,—he would be disqualified. We apprehend that it would hardly be contended that, if the appellant in this case had had a former trial before these same jurors, and had been convicted, and for some cause a new trial awarded him, they would be considered competent jurors on a subsequent trial of the case; and the court would scarcely permit that they should even go through the form of an examination to ascertain whether or not the opinion formed on the previous trial would influence them in finding a verdict. No such self-stultification on the part of the jurors would be allowed. See *Shannon vs. State* (Tex. Cr. App.) 28 S. W. 540; *Suit vs. State,* 30 Tex. Cr. App. 319, 17 S. W. 458. In this case, the jurors in question, as before stated, sat in a case which involved the identical transaction for which the defendant was tried. They received the evidence in that case in the most solemn form, and rendered a verdict. They had thus formed and expressed an opinion on the same facts upon which the appellant was to be tried, and we can scarcely conceive how it was pos-

> sible for them to lay aside their already formed opinions, so as to constitute themselves fair and impartial jurors. Some men may be competent to do this, but they must constitute a very inconsiderable portion of those from whom the jury lists are drawn to try cases. In our opinion, the precedent would be a dangerous one, and, besides, it would appear to be an innovation upon the very meaning of the statute itself. The court below should have set aside these jurors as incompetent to try this case."

Other cases announcing the same rule are as follows:

Shannon vs. State (Tex.) 20 S. W. 540;

People vs. Maull, 100 N. W. 913 (Mich.)

Curtis vs. State (Ala.) 24 So. 111;

Stevens vs. State, 53 N. J. L. 245; 21 Atl. 1038;

Gorthwaite vs. Tatum, 21 Ark. 336; 76 Am. Dec. 402;

Railway Co. vs. Smith, 60 Ark. 221.

Whatever difference of opinion there might be as to the right to challenge these jurors for cause and to have such challenge sustained, there can be no question, from the standpoint of the plaintiff in error, as to the undesirability of having jurors who had found him guilty of a similar charge upon similar evidence sit as jurors in the present case. Consequently when the court limited his number of peremptory challenges to one-half of those allowed by statute, plaintiff in error was denied a right material to his defense.

FOURTH

In this subdivision, we will discuss briefly the action of the trial judge in refusing to permit the witness William Kirkland to testify when called as a material witness on behalf of the plaintiff in error. Upon a suggestion that this witness entertained some peculiar views as to religion and the hereafter, he was examined at considerable length by counsel for the respective parties and by the court. (Trans. 66 to 76.) After this interrogation had been concluded, the court held that he could not be sworn as a witness, (Trans. 16) and denied the plaintiff in error the right to submit his testimony to the jury upon questions material to the issue.

The proposed witness stated, as appears from his testimony quoted in the assignments of error herein, that he believed in a Supreme Being but was of the opinion that persons guilty of perjury received their punishment through the operation of their conscience in this world and not in the hereafter. The court, however, adhered to the ancient common law doctrine and held that a person who did not believe that he would receive punishment in the hereafter was not qualified to be sworn as a witness. (Trans. page 16) This was prejudicial to the plaintiff in error.

In 40 Cyc. page 2202, the general rule on this subject is succinctly stated as follows:

> "The original common-law rule is that a person must, in order to be a competent witness believe in God, and in a state of future reward or punishment; but this has been modified so as to let in the testimony of persons who believe in the existence of a Supreme Being, although not in rewards and punishment after death, and in a number of jurisdictions the common-law rule is entirely abrogated by constitutional or statutory provisions under which religious belief or the lack of it has no bearing whatever on the competency of the witness."

In the State of Washington, this is settled by a constitutional enactment,

> "No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony." (Const. Art. 1, Sec. 11 and 4th Amend. thereto).

The rule is quite general that one who believes in the existence of a Supreme Being and that God will punish in this world for every sin committed, though he does not believe that punishment will be inflicted in the world to come, is a competent witness.

Shaw vs. Moore, 49 N. C. 25;

Blocker vs. Burgess, 2 Ala. 354;

United States vs. Kennedy, 26 Fed. Cas. No. 15524; 3 McLean 175;

Blair vs. Seaver, 26 Penn. St. 224;

Shaw vs. Moore, 49 N. C. 26.

From the case first cited we quote the following:

"The case presents this question: Is a person who 'believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in *this world,* all violators of his law, and that the sinner will inevitably be punished *in this world* for each and every sin committed; but there will be no punishment *after death,* and that in another world all will be happy and equal to the angels'— a competent witness?

"The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. In reference to the first, no question is made; but it is insisted, that the religious sanction required, is the fear of punishment in a *future* state of existence.

"This position is not sustained by the reason of the thing, for, if we divest ourselves of the prejudice growing out of proconceived opinions as to what we suppose to be the true teaching of the Bible, it is clear that, in reference to a religious sanction, there is no ground for making a distinction between the fear of punishment by the Supreme Being in this world, and

the fear of punishment in the world to come; both are based upon the sense of religion. If, on the one hand, it be said, that there is, in the fear of punishment in a future state of existence, an awful, undefined dread, and on the other, that from the constitution of our nature, we fear more that punishment which is near at hand, than that which is distant, the reply is, this is matter of speculation merely, and has no bearing upon the question, because the efficacy of the fear of punishment in either case, depends upon the degree of the belief as to the certainty of that punishment; so that, there can be, upon reason, no ground for making a distinction. The rule of law which requires a religious sanction, is satisfied in either case.

"It is true, that in the old cases it is held to be the common law, that no infidel, (in which class Jews were included,) could be sworn as a witness in the courts of England, which was a *Christian* country; and *Lord Coke* gives this as his opinion, in which he says all the cases agree, and he assigns as the reason on which the law is based, 'All infidels are in law *perpetui inimici;* for, between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility.' This reason to say the least of it, is narrow-minded, illiberal, bigotted and unsound.

* * * *

"Afterwards, in the case of *Omychund vs. Barker,* 1 Atk., 19 and Willes, 538, it was decided by the Lord Chancellor, with the assistance of Chief Baron Parker, Chief Justice Willes and Chief Justice Lee, that a Gentoo, who was an infidel, who did not believe in either the

Old or New Testament, but 'who believed in a God, as the Creator of the Universe, and that he is a *rewarder of those who do well, and an avenger of those who do ill,'* is, according to the common law, a competent witness, and may be sworn in that form which is the most sacred and obligatory upon his religious sense.

* * * *

"The great case of *Omychund vs. Barker,* (it may well be called 'great,' for it relieved the common law from an error that was a reproach to it,) establishes the rule to be, that an infidel is a competent witness, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. The substance of the thing is, every oath must have a religious sanction. Such being the common law in regard to infidels, it follows, *a fortiori,* that the same rule is applicable to a witness, who is a *Christian;* and the fact, that this Christian believes that the divine punishment will be inflicted in this world, and not in the world to come is immaterial, and in no wise affects the principle of the rule. It is a mere 'difference of opinion,' as to the true teaching of the Gospel. This we find is the conclusion of the courts in most, if not all, of the states of the Union where the question has been presented for adjudication. 15 Mass., 177; 2 Cush., 104; 18 John., 98; 5 Mason, 18; 2 Ala., 354; S. C. Law Journal, 202; 13 Vt. 362." (Italics, the Court's).

In the second case cited, the court discusses the same question as follows:

"The learned and elaborate opinion of Chief

Justice Willes, in the case of *Omichund vs. Barker,* Willes' Rep. 538 is the text generally resorted to on this interesting subject. The question in that case was, whether an East Indian, professing the Gentoo religion, who had given evidence on a commission issuing out of Chancery, who had been sworn according to the custom of his religion, was a competent witness.

"The learned Judge proceeds to show, that the substance of an oath had nothing to do with Christianity—that oaths were more ancient than the Christian religion, and successfully combats the notion of Lord Coke, that an infidel could not be a witness. He expressly lays down the doctrine, 'that an infidel, who believes in a God, and that he will reward and punish him in this world, but does not believe in a future state may be examined on his oath.'

"In the case of *Butts vs. Swartwout,* 2 Cow. 431, a witness professing the same religious belief as the witness in this case appears to entertain, was held to be a competent witness. Indeed, if we consider the source of the obligation of an oath, it appears strange that the question should be raised in this enlightened age of the world. An oath is a solemn adjuration to God, to punish the affiant if he swears falsely. The sanction of the oath is a belief, that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief, that God is the aven-

ger of falsehood; see, also, (*Hunscom vs. Hunscom*), 15 Mass. 184."

In the case of *United States vs. Kennedy,* (supra) Fed. Cas. No. 15,524, the court in discussing the same question, uses the following pertinent language:

> "However highly the witness may appreciate character, and however strongly he may detest the crime of perjury, from the infamy attached to it, still the law requires a higher obligation to operate upon the conscience of the witness. He must believe in a Superintending Providence, who punishes crime. This presupposes a belief in a future state. The authorities are divided on the point whether, if the rewards and punishments, according to the belief of the witness, are to be inflicted in this life, he is competent. *Com. vs. Bacheler,* 4 Am. Jur. 81. In *Hunscom vs. Hunscom,* 15 Mass. 184, the court held that mere disbelief in a future existence went only to the credibility. Contra, *Atwood vs. Welton,* 7 Conn. 66. In the case of *Omichund vs. Barker,* Willes, 1 Atk. 21, where the subject was largely discussed, it was held, that the belief of a God, and that he will reward and punish us according to our deserts, is essential; but whether the rewards and punishments are limited to this life, or the next, is not material. At least this view is sustained by the weight of authority. The individual who believes that a bad act will be punished in this life, and a good one rewarded, by God, cannot be said to act free from that moral influence of hope and fear which the law contemplates as

> the best security against punishment. This influence will operate more strongly, when referred to the future than the present life. And it would seem, as stated in some of the authorities, that a disbelief in a state of future rewards and punishments should go to the credibility of the witness, and not to his competency. 1 Greenl. Ev. Secs. 368-370."

Fifth

In this subdivision will be included assignments of error, seven, eight, and nine. These assignments involve the erroneous action of the trial court in denying the motion of the plaintiff in error for a new trial and his motion in arrest of judgment, and in sentencing him to serve a term of two years in the United States penitentiary at McNeil's Island. and pay a fine of five hundred dollars.

The discussion under the previous subdivisions completely covers these assignments of error and nothing further need be added. If the contention of the plaintiff in error as to those assignments of error is correct, then it was the duty of the trial court to grant the motion of the plaintiff in error in arrest of judgment, and its failure to do so was erroneous.

For the reasons hereinbefore given, we respectfully submit that the judgment in this case should be reversed with instructions to the lower court to dismiss the action and discharge the plaintiff in error from custody and exonerate his bond.

Respectfully submitted,

WALTER S. FULTON, and
WM. R. BELL,
Attorneys for Plaintiff in Error.